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May 21, 2019

The Honorable Michael Carpenter
The Honorable Donna Bailey
Chairs, Joint Standing Committee on the Judiciary
State House, Room 438
Augusta, Maine 04333

Re: L.D. 766, *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013*

Senate Chair Carpenter, House Chair Bailey, and Members of the Committee:

I am writing neither for nor against L.D. 766, *An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 2010 and the Federal Violence Against Women Reauthorization Act of 2013*, to share our office's perspective on this legislation.

I support the expansion of jurisdiction of the Penobscot Nation Tribal Court over non-Indians for specified misdemeanor-level crimes committed on the Penobscot Indian Reservation, as defined by 30 M.R.S. § 6203(8). This office is committed to reaching an outcome that will not only allow the Penobscot Nation to exercise criminal jurisdiction over non-Indians for crimes of domestic violence, but also ensure that criminal defendants are not deprived of their state and federal constitutional rights.

The effect of this legislation would be to expand jurisdiction for the Penobscot Nation Tribal Court under the Tribal Law and Order Act of 2010 (TLOA) and the Federal Violence Against Women Reauthorization Act of 2013 (VAWA 2013). As it is presently drafted, this office is concerned that L.D. 766 would create jurisdictional and constitutional uncertainty because of the importation of these federal laws into Maine's system.

The Legislature can fulfill the promise of the TLOA and VAWA 2013 in protecting native victims, while also protecting individual rights. The jurisdictional and constitutional uncertainties can be addressed through amendments to L.D. 766 and within the framework of the

Maine Implementing Act (MIA), 30 M.R.S. §§ 6201-14, as confirmed by Congress in the Maine Indian Claims Settlement Act (MICA), formerly codified at 25 U.S.C. §§ 1721-35. The office has prepared a draft amendment to L.D. 766 in order to address the uncertainties described below.

Jurisdictional uncertainty. Section A-1 of L.D. 766 strikes the language providing for exclusive state jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation and adds a new sentence giving the tribe or nation jurisdiction over those violations and violators:

~~The State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation. The tribe and the nation each has jurisdiction within its respective territory over a person who is not a member of either tribe or nation in accord with and to the extent authorized by federal law.~~

The proposed language could have consequences beyond the incorporation of the TLOA and VAWA 2013 jurisdiction for the Penobscot Nation.¹ More clarity is needed so that the Legislature and the Penobscot Nation can ensure there is sufficient agreement as required by section 1725(e) of MICA.

The TLOA and VAWA 2013 expanded the potential criminal jurisdiction and obligations of tribal courts in significant ways. Because of the specific statutory construct that already exists in Maine, and which differs from that of all other federally recognized tribes, it is unclear how L.D. 766's importation of these laws would fit into Maine's system in at least five ways: what protections would be provided to criminal defendants; what crimes could be prosecuted in Penobscot Nation Tribal Court; sentencing disparities; the effects of exclusive versus concurrent jurisdiction; and the geographic scope of the Penobscot Nation Tribal Court's criminal jurisdiction. Each category, if not addressed, could result in appeals and collateral attacks on criminal convictions that result from the exercise of any expanded jurisdiction and prosecutorial confusion.

1. *Protections provided to criminal defendants.* Currently, section 6209-B(2) of MIA provides that "the provisions of 25 United States Code, Sections 1301 to 1303 [i.e., the Indian Civil Rights Act (ICRA)] and rules or regulations generally applicable to the exercise of criminal jurisdiction by Indian tribes on federal Indian reservations" shall apply in Penobscot Nation Tribal Court. When this language was added in 1995, section 1302 of ICRA guaranteed comparable, but not identical rights to some of the constitutional protections guaranteed by the United States and Maine Constitutions.

Through TLOA and VAWA, Congress has expanded the rights guaranteed to criminal

¹ For example, the proposed language of Section A-1, although included in a section entitled "Tribal Ordinances," could be interpreted far more broadly. A broader interpretation could subject non-Indians to the jurisdiction of the Penobscot Nation and the Passamaquoddy Tribe for all purposes "authorized by federal law," not just permit the Penobscot Nation Tribal Court to exercise "special domestic violence criminal jurisdiction" over non-Indian defendants. This uncertainty could also result in increased litigation outside the context of criminal jurisdiction and underscores the need for clarity.

defendants prosecuted in tribal courts. The Penobscot Nation, through its Rules of Court, has adopted additional protections for criminal defendants similar to those found in TLOA and VAWA. Nevertheless, the bill does not specifically provide that rights guaranteed in the Maine Constitution, the Federal Constitution, and comparable provisions of TLOA and VAWA must be guaranteed in tribal court as well. Currently, federal and/or state constitutional requirements of a jury of 12, unanimity of jury verdicts, a jury drawn from a fair cross section of the community and not systematically excluding any distinctive group (such as non-Indians), and grand jury indictments (for felony-level crimes) are not required in tribal court proceedings. Doing so would serve to protect both individual liberties and the integrity of convictions.

2. Types of crimes. Presently, the Penobscot Nation Tribal Court has criminal jurisdiction over Class D and E crimes committed by members of the Penobscot Nation and individuals who are members of any other “federally recognized Indian tribe, nation, band or other group.”² If VAWA 2013 were to be applied in Maine, it would provide the Penobscot Nation Tribal Court with concurrent jurisdiction over crimes of “dating violence” and “domestic violence.” These federal definitions are not identical to those in Maine law, and could confer unanticipated jurisdiction over a range of felony-level crimes. The exercise of felony-level jurisdiction presents constitutional issues that would also provide criminal defendants with additional defenses, to detriment of individual liberty and public safety.

To avoid confusion over which crimes are to be the subject of expanded jurisdiction, we recommend that the Legislature specifically identify the scope of expanded jurisdiction by reference to Maine law and specific crimes. For example, the bill could make it clear that expanded (over non-Indian) Tribal Court jurisdiction would apply only to the following misdemeanor-level offenses: domestic violence assault (17-A M.R.S. § 207-A) domestic violence criminal threatening (17-A M.R.S. § 209-A), domestic violence terrorizing (17-A M.R.S. § 210-B), domestic violence reckless conduct (17-A M.R.S. § 211-A), domestic violence stalking (17-A M.R.S. § 210-C), and violation of protection from abuse orders (19-A M.R.S. § 4011). Tribal court jurisdiction over these domestic violence crimes would address the problem of domestic violence against Native persons on tribal lands and avoid constitutional defects.

3. Sentencing disparity. At present, the Penobscot Nation Tribal Court can impose a sentence of up to a year and a fine of up to \$5,000 for a single offense. TLOA permits tribal courts to impose imprisonment of up to three years and a fine of \$15,000 for any one offense, but caps the potential sentence for any one criminal proceeding at nine years. 25 U.S.C. § 1302(a)(7)(C), (D). There is no such limitation in state courts, thereby introducing the possibility of disparate sentences being imposed by the two different systems. A tribal court might be limited in its ability to impose appropriate sentences on a serious domestic violence offender if it attempts to assert jurisdiction over felony-level crimes but is subject to the limitation above. Moreover, the language included in Part B of L.D. 766 is inconsistent with how Maine has classified felony-level domestic violence crimes. This inconsistency, if left unaddressed, creates an area for future challenge.

² The statutory language does not include crimes committed by organizational defendants; jurisdiction over those defendants rests with the state courts.

4. Exclusive vs. concurrent jurisdiction. The present division of criminal jurisdiction between the Penobscot Nation Tribal Court and state court is clearly defined because both court systems exercise exclusive jurisdiction. If the criminal jurisdiction of the Penobscot Nation Tribal Court were expanded, there would be a certain class of crimes over which Maine Courts and Penobscot Nation Tribal Court had concurrent jurisdiction, i.e., crimes of dating violence or domestic violence committed in Indian country by a non-Indian defendant. Again, because of definitional inconsistencies, the fact of concurrent jurisdiction introduces uncertainty with respect to which sovereign should exercise jurisdiction. The resulting confusion for law enforcement over which prosecutor to select, as well as for prosecutors over the court to which cases should be directed, may have the unintended and entirely undesirable effect of undermining enforcement—and thus efforts to hold offenders accountable and protect victims and survivors.

5. Geographic scope. Presently, the Penobscot Nation Tribal Court has jurisdiction over crimes committed on the Penobscot Indian Reservation. The TLOA and VAWA 2013 apply to offenses committed in “Indian country,” a broader term that includes tribal lands outside the reservation. Applied to the Penobscot Nation, “Indian country” could therefore include some criminal jurisdiction over all Penobscot Indian territory, i.e., both the Penobscot trust lands and the Penobscot Indian Reservation, as defined in sections 6203 and 6205 of MIA.

As of August of 2018, the Penobscot trust lands totaled ~93,000 acres of land spread in several parcels within Penobscot, Piscataquis, and Franklin Counties, in some cases hundreds of miles from the Penobscot Indian Reservation (encompassing ~4,800 acres).³

Constitutional uncertainty. The constitutionality of expanding the criminal jurisdiction of tribal courts over non-Indians as provided in VAWA 2013 has not yet been tested. The Supreme Court ruled that in 1978 that tribal courts do not have jurisdiction over non-Indians in criminal matters. *Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191 (1978); *cf United States v. Lara*, 541 U.S. 193 (2004) (permitting tribal courts to exercise criminal jurisdiction over Indian defendants that are not members of the same tribe). The Supreme Court has specifically reserved the question of whether the extension of tribal court jurisdiction over non-Indian defendants in certain domestic violence criminal cases under VAWA 2013 is constitutional. *United States v. Bryant*, 136 S. Ct. 1954 n.4 (2016).

In the absence of a Supreme Court decision expressly upholding the expansion of tribal court criminal jurisdiction to non-tribal defendants, the Legislature should ensure that criminal defendants in tribal court are offered the same federal and state constitutional protections that are available in Maine state courts. As previously noted, federal and/or state constitutional requirements of a jury of 12, unanimity of jury verdicts, a jury drawn from a fair cross section of the community and not systematically excluding any distinctive group (such as non-Indians), and grand jury indictments (for felony-level crimes) are not required in tribal court proceedings.

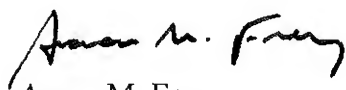
Finally, the Legislature should take this opportunity to ensure that criminal history record information from any tribal court in Maine is shared with the State and input into the Maine

³ Map of Penobscot Nation Tribal Lands, https://www.penobscotnation.org/images/natural-resources/GIS/PDFs/TribalLands/TribeLand8x11wtshd_acres_002.pdf.

criminal history database. Criminal history record information is used for purposes such as the sex offender registration, firearms prohibitions, bail determinations, risk assessment in domestic violence cases, and sentencing enhancement. Expansion of criminal jurisdiction without assurances that Penobscot Nation Tribal Court convictions will be part of the State of Maine criminal history database will exacerbate an existing information gap to the detriment of public safety.

My office would be pleased to work with the Committee on the issues summarized above and to answer any questions. A draft of a proposed amendment to L.D. 766 to address the current uncertainty in the bill is attached.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron M. Frey".

Aaron M. Frey
ATTORNEY GENERAL

Enclosure

DRAFT AMENDMENT TO LD 766

Amend the bill by striking Sec. A-1 and inserting the following:

Sec. A-1. 30 MRSA §6206, sub-§3, as enacted by PL 1979, c. 732, §§1 and 31, is amended to read:

3. Ordinances. The Passamaquoddy Tribe and the Penobscot Nation each ~~shall have~~ has the right to exercise exclusive jurisdiction within its respective Indian territory over violations by members of either tribe or nation of tribal ordinances adopted pursuant to this section or section 6207. The decision to exercise or terminate the jurisdiction authorized by this section ~~shall~~ must be made by each tribal governing body. ~~Should~~ If either tribe or nation ~~choose~~ chooses not to exercise, or to terminate its exercise of, jurisdiction as authorized by this section or section 6207, the State ~~shall have~~ has exclusive jurisdiction over violations of tribal ordinances by members of either tribe or nation within the Indian territory of that tribe or nation. Except as provided in section 6209-B, the ~~The~~ State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation.

Amend the bill by striking Sec. B-2 and inserting the following:

Sec. B-2. 30 MRSA §6209-B, sub-§1-A, is enacted to read:

1-A. Concurrent jurisdiction over certain criminal offenses. The Penobscot Nation has the right to exercise jurisdiction, concurrently with the State, over the following criminal offenses committed by an individual on the Penobscot Indian Reservation for which the maximum term of imprisonment does not exceed one year and the potential fine does not exceed \$2,000: sections 207-A, 209-A, 210-B, 211-A, or 210-C of Title 17-A and section 4011 of Title 19-A. The concurrent jurisdiction authorized by this subsection does not include offenses committed by juveniles.

The governing body of the Penobscot Nation shall decide whether to exercise or terminate the exercise of jurisdiction authorized by this subsection. Notwithstanding subsection 2, if the Penobscot Nation chooses to exercise jurisdiction under this subsection, the Penobscot Nation shall not deny to any criminal defendant the rights guaranteed by the United States Constitution and the Maine Constitution. In exercising the concurrent jurisdiction authorized by this subsection, the Penobscot Nation is deemed to be enforcing Penobscot tribal law. The definitions of the criminal offenses and the punishments applicable to those criminal offenses over which the Penobscot Nation has concurrent jurisdiction under this subsection are governed by the laws of the State. Issuance and execution of criminal process also are governed by the laws of the State.

Amend the bill by adding Sec. B-3:

Sec. B-3. 30 MRSA §6209-B, sub-§4, as enacted by PL 1995, c. 388, § 6 and affected by § 8, is amended to read:

4. Double jeopardy, collateral estoppel. A prosecution for a criminal offense or juvenile crime over which the Penobscot Nation has exclusive jurisdiction under this section does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the State has exclusive jurisdiction. A prosecution for a criminal offense over which the Penobscot Nation has concurrent jurisdiction under this section does not bar a prosecution for a criminal offense, arising out of the same conduct, over which the State has exclusive jurisdiction. A prosecution for a criminal offense or juvenile crime over which the State has exclusive jurisdiction does not bar a prosecution for a criminal offense or juvenile crime, arising out of the same conduct, over which the Penobscot Nation has exclusive jurisdiction under this section. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a tribal forum does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a state court. The determination of an issue of fact in a criminal or juvenile proceeding conducted in a state court does not constitute collateral estoppel in a criminal or juvenile proceeding conducted in a tribal forum.

Amend the bill by adding Part C:

PART C

Sec. C-1. 25 MRSA § 1547, as amended by PL 2009, c. 447, § 24, is further amended to read:

§1547. Courts to submit criminal records to the State Bureau of Identification

At the conclusion of a juvenile court proceeding or at the conclusion of a prosecution for a criminal offense except a violation of Title 12 or Title 29-A that is a Class D or E crime other than a Class D crime that involves hunting while under the influence of intoxicating liquor or drugs or with an excessive alcohol level or the operation or attempted operation of a watercraft, all-terrain vehicle, snowmobile or motor vehicle while under the influence of intoxicating liquor or drugs or with an excessive alcohol level, the court, including the tribal court of any federally-recognized Indian tribe within the State, shall transmit to the State Bureau of Identification an abstract duly authorized on forms provided by the bureau.